CHANAN KAUR & ORS.

v.

CHUA HUP LEE & AMBROSE WONG & ORS.

FEDERAL COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
SALLEH ABAS FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 65 OF 1982]
16 DECEMBER 1982

LANDLORD AND TENANT: *Increase by Labuan Tenancy Tribunal of standard rents of premises under s. 4(2) - Rent Control (Business Premises) Enactment 1966 Sabah - Whether contrary to ss. 17(1), (2) - Principle applicable.*

CIVIL PROCEDURE: *Delay in application for review of decision by High Court - Whether fatal - Section 20 - Lack of quorum at delivery of decision - Whether decision null and void - Section 13(1).*

The appeal arose from the decision of the High Court in refusing the appellants' application under s. 20, Rent Control (Business Premises) Enactment 1966 of Sabah ("the Enactment") to set aside an order, made on an application under s. 4, by the Labuan Tenancy Tribunal ("LTT") increasing the standard rents of the premises of which the appellants were tenants. There had been a delay of 6 days in the application under s. 20 for a review of the order of the LTT increasing the rent. Another issue considered by the Federal Court was the one of quorum at the time the LTT delivered its decision. The appellants objected to the backdating of the new standard rent. But the main submission of the appellants was that in fixing the standard rent in that case the LTT had acted contrary to ss. 17(1) and (2) of the Enactment by accepting the advice of the State Valuer of Lands and Surveys Department, Kota Kinabalu, in the absence of the appellants.

Held:

[1] As no one had raised the issue of delay the short delay of 6 days did not affect the subsequent proceedings before the High Court or the Federal Court.

[2] Lack of quorum on the occasion the LTT delivered its decision was immaterial. Section 13(1) required a quorum only when the LTT sits for the purpose of considering an application, not when the LTT was merely conveying it.

[3] The backdating of the new standard rent to a date beyond the date on which appeal for variation was made was not reasonable.

[4] By considering and accepting the advice of the State Valuer who was not a witness nor its member the LTT was in serious breach of natural justice.

[Appeal allowed. Cross-appeal dismissed.]

Legislation referred to:
Rules of the Federal Court 1980, r. 67(2)
Rent Control (Business Premises) Enactment (Sabah) 1966, ss. 4(1), 4(2), 11, 13(1), 15(1)(b), 17, (1), (2), 18, 19, 20

For the appellants - James Puthucheary (Abdul Razak Rouse with him); M/s. Rayner & Co.
For the respondents - Leong Funk Chiew; M/s. Shelley Yap Leong Tseu Chong Chia & Co.

JUDGMENT

Salleh Abas FJ:

This appeal arose from the decision of Wan Mohamed J in refusing the appellants' application by Originating Motion, OM No. 1/1981, under s. 20 of the Rent Control (Business Premises) Enactment, 1966 of Sabah to set aside an order made on 23 December 1980 by the Labuan Tenancy Tribunal increasing the standard rents of the premises of which the appellants are tenants.

The Labuan Tenancy Tribunal (LTT) is a body established under s. 11 of the Enactment, charged with the duties of fixing and determining what is known as the standard rent for business premises, which is defined as that "ascertained or fixed" in accordance with the provisions of the Enactment. The Enactment lays down an elaborate procedure for this purpose. Upon an application of either the landlord or the tenant of any premises for the purpose of fixing the standard rent or for increasing or reducing such rent the LTT has to hear and determine such application and make an order accordingly. In fixing or varying the standard rent s. 15(1) enacts that the LTT has to have "regard to the provision of s. 17". This section contains provisions as to the principles on which the LTT should act in fixing or varying the standard rent. We shall advert to these principles at the later stage of this judgment.

Under certain circumstances the LTT is empowered by the Enactment to review, vary or set aside its own order (s. 18). Under s. 19 the LTT may review by way of case stated for consideration of the High Court any question of law arising at any stage of its proceedings, and under s. 20 the proceedings and the grounds of its order can be called into question in the High Court either at the instance of the Court itself or on the application by an aggrieved party. Such application must be made within 14 days of the LTT's decision.

In the present appeal the LTT gave its decision on 23 December 1980 and the application under s. 20 was not made until 12 February 1981. There was thus a lapse of twenty days. As nobody raised this issue, this short delay of six days in our view being a mere irregularity should not affect the subsequent proceedings before the Court below and before us.

Pursuant to applications by the respondent (landlords) for increase of the standard rents under s. 4(2), the LTT sat on two occasions, i.e. on 29 & 30 September 1980 to hear the applications and duly recorded the evidence given by both sides. After an adjournment, on 23 December 1980 the LTT delivered its decision and present on this occasion were the chairman and one member only, the others being absent. The quorum of the LTT is governed by s. 13(1) which is as follows:

(1) Three members of a Tribunal, of whom the Chairman shall be one, shall form a quorum for the transaction of the business of the Tribunal.

Counsel for the appellants therefore submitted that the LTT, lacking in quorum, could not deliver its decision and that the decision given and the subsequent orders made pursuant to such decision were null and void, contending that the phrase "the transaction of the business" in s. 13(1) includes the delivery of its decision and that unless the Enactment makes a provision for a lesser number of members to be present for the purpose of delivering its decision, the decision and the subsequent orders made were null and void. He drew an anology from the practice of the Federal Court in which, more than not, only one member of the Court gives judgment, although the hearing of appeals may be heard by five or three Judges. The practice is based on r. 67 (2) of the Federal Court Rules which is as follows:

Such judgment may be pronounced notwithstanding the absence of the Judges who composed the Court or any of them, and the judgment of any Judge not present may be read by a Judge of the Federal Court or of a High Court or by the Registrar.

With respect to Counsel, we find ourselves in disagreement with his submission. Although the phrase "the transaction of the business" may well include the delivery of judgment or decision, this phrase in the context of s. 13 of the Enactment cannot be given such a wide meaning because the proviso of the section clearly speaks of the quorum "for the purpose of the **consideration** of such matter." The sitting of the LTT on 23 December 1980 was not for the purpose of considering the application to vary the standard rents; these having been considered earlier, but for the purpose of conveying or communicating its decision to the parties. Lack of quorum in our view is immaterial, because the LTT had nothing to consider.

Reverting to the analogy of the Federal Court's practice, we observe that the practice of a single Judge giving judgment of the Court is founded only on the rule and this was not at all mentioned in the Judicature Act. Giving judgment is the last function of the Court after its deliberation and consideration of the matter before it is over. Clearly it is not a matter which affects the substance or jurisdiction and could really be regarded as merely an incidental or a ministerial act and as such it was relegated to the rules only. That being the case, we see no merit in the appellants' ground of appeal on this point.

The only ground of appeal which merits our consideration is the appellants' submission that in fixing the standard rent in this case the LTT acted contrary to s. 17(1) and (2) of the Enactment.

The Applications to vary the standard rents were all made under s. 4(2) and heard by the LTT under s. 15(1)(b). Section 4(2) says-

4. (2) The landlord or the tenant of any business premises may at any time apply to the Tribunal to vary the standard rent of such premises.

Section 15(1)(b) says:

15. (1) A Tribunal in respect at any business premises situated within its area of jurisdiction-

...

> (b) shall hear and determine any application made under subsection (2) of s. 4 of this Enactment and may make such order varying the standard rent of the premises concerned as to the Tribunal may seem just and proper having regard to the provisions of s. 17 of this Enactment, or may refuse to make such an order.
>
> Provided that the Tribunal shall refuse to make such an order having the effect of varying a prior rent order unless such rent order may properly be varied under the provision of s. 18 of this Enactment;

Thus the substantive principles upon which the LTT must act in order to fix the standard rent as we have said earlier are contained in s. 17.

Subsection (2) of s. 17 makes a provision that in respect of an application under s. 4(2), the LTT may vary the standard rent whenever-

> the standard rent of the premises concerned is in the opinion of the LTT substantially higher or lower than it would be if ascertained on the principles of subsection (1) of this section.

Thus LTT has to make two findings, *viz*:

(1) what is the existing standard rent, i.e. the rent at which the premises are currently let; and

(2) what would be the standard rent if the principles in sub-section (1) of s. 17 is applied, i.e. the notional or the would-be standard rent.

Only in cases where the differences between the existing and the would-be standard rents either up or down are substantial, would the LTT vary the existing standard rent. If the differences are merely minor, no variation would be made. Whilst there is ample evidence of the current rents at which the premises are let, there is no clear evidence which could assist the LTT to determine the would-be standard rent. This would-be standard rent is not the rent which the landlords asked for, but one which has to be determined with reference to the principles contained in sub-section (1) of s. 17.

What then is the principle? According to this subsection - sub-section (1) of s. 17 - the standard rent is such rent "as, in the opinion of the Tribunal, might reasonably have been expected in respect of a similar letting of similar business premises in the same locality." This means that there must be two criteria in order to constitute the standard rent at any given time - namely, reasonableness and comparableness. We therefore reject the contention of the respondents that the principle under s. 17(1) is not applicable to the application of variation of the standard rent under s. 4(2). This submission is completely misconceived as it renders the concept of variable standard rent completely nugatory. Perhaps it is more accurate to say that the standard rent as an expression is conceived by the Enactment as immutable but its amount at any given time is not necessarily static but variable. To say that sub-section (1) of s. 17 does not apply to the deliberation of the LTT on an application for variation of the standard rent is to go against this basic purpose of the Enactment.

According to the notes of the evidence given before the LTT, the respondents asked for the rental with reference to the areas of the premises at the rate of RM1 per square foot. Whilst it is not wrong for the LTT to proceed in fixing the standard rent according to rate per square foot and whilst we appreciate that it is the LTT's function, and not that of the Court, still less ours, to fix the standard rent, the decision of the LTT and its orders could be set aside by the Court if the LTT is found to have acted against the principle upon which it is required to act.

According to its decision, the LTT appeared to have consulted the State Valuer of the Lands and Surveys Department, Kota Kinabalu. The relevant paragraphs of the LTT's decision are as follows:

> Upon hearing all the applications made by the landlords of shophouses and upon hearing submissions presented by both lawyers for the landlords and tenants, this Committee, **after hearing advice from the State Valuer of the Lands & Surveys Department, Kota Kinabalu** has decided that Standard Rent applicable upon these shops stated below...
>
> This Committee found that localities of shophouses in Labuan are immaterial because we felt that wherever the locality of a shop amounts to same visiting customers. **From the calculation of the assisting valuer of shophouses based on the existing market value the standard rent that this Committee has fixed is fair and reasonable.**
>
> This standard rent is effective from 1 November 1979. (Emphasis is ours)

The learned trial Judge considered that the backdating of the new standard rent to 1 November 1979 was unreasonable and so altered its effective date to 1 January 1981. The interference by the learned trial Judge drew a cross-appeal by the respondents. There is of course nothing in the Enactment which prohibits the LTT from backdating its decision, so long as it is reasonable to do so. we have no idea why the date of the commencement should be either on 1 November 1979 or 1 January 1981. We should have thought that the date on which the decision was made should be the starting point but if the back-dating is necessary it should not go beyond the date on which applications for variation were made.

On this score the LTT's decision cannot be held to be reasonable, there being no basis for such date of commencement.

But the serious objection to its decision is consultation and acceptance of the advice of the State Valuer, who was not a witness, nor its member.

Whilst the matter of fixing and determining the standard rent is highly technical, and assistance must be sought from persons trained in the profession, and acquainted with the supply and demand of rented premises, the LTT is not empowered to consult them in the absence of the parties. In this case the State Valuer gave no evidence and we have no means of knowing what advice he had tendered to the LTT, nor do we know his computation of the standard rent which is said to be based on the market value of the premises. As the parties were not in a position to challenge his computation and advice, we consider that acceptance of his advice is a serious breach of natural justice, entitling the appellants to this appeal.

Counsel for the appellants argued strongly that it was contrary to the principle enacted by s. 4(1) to base the standard rent on the market value of the premises.

We prefer to leave this point open as we do not wish to go so far as to say that comparison of market value of the premises is not permissible for fixing the standard rent. If for example, a shop, whose market value is at RMX, is let out at RMY, surely it is reasonable to expect another shop, whose market value is comparable to the first mentioned shop, should be rented at about the same rental. In the present case, we do not know in what way the State Valuer calculated the standard rent with reference to the market value of the premises. Unless there is evidence we cannot say.

For the reasons given we allow the appeal with costs and dismiss the cross-appeal also with costs, and the deposit should be refunded to the appellants.

Since the standard rent is a continuing process, the respondents are not in any way prejudiced by this judgment, if they so wish, to start fresh proceedings before the LTT.

Also found at [1983] 1 CLJ 121